

APR 23 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SILVERIO ORTEGA-AMARO,

Defendant - Appellant.

No. 06-55875

D.C. Nos. CV-06-00404-AHM
CR-02-00539-AHM-05

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted March 6, 2008
Pasadena, California

Before: SCHROEDER, WARDLAW and TALLMAN, Circuit Judges.

Silverio Ortega-Amaro, a federal prisoner, appeals the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The mandatory minimum sentence of 120 months was imposed after he pleaded guilty to conspiracy to distribute cocaine.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Petitioner contends that his trial counsel was ineffective because counsel did not properly argue that he was eligible for a safety valve sentence reduction under 18 U.S.C. § 3553(f). To be eligible for the reduction, a defendant must satisfy five requirements, including, number four, that he did not participate in the offense as an organizer, leader, manager, or supervisor in the criminal endeavor, and, number five, that he truthfully provide to the government all the information he has about the crime and his participation in it before sentencing. See 18 U.S.C. § 3553(f)(4), (5). The parties stipulated that Ortega satisfied the first four requirements, and the only matter remaining for argument at sentencing was whether he had satisfied the fifth requirement.

Ortega's counsel withdrew the request for the safety valve reduction because Ortega had not been fully forthcoming in describing his participation and knowledge of the crime in meetings with the government. See United States v. Sherpa, 110 F.3d 656, 660 (9th Cir. 1996) (stating that subsection five is a "tell all you can tell" requirement that requires a defendant to describe his role in the offense). Ortega did not satisfy the fifth requirement for the safety valve. Instead, he described himself during the meetings and at sentencing as merely a courier, even though the overwhelming evidence demonstrated that his role in the conspiracy was more significant. As a result, petitioner cannot show that his

attorney's failure to argue for the application of the safety valve prejudiced his sentencing. See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

Petitioner also asserts that his attorney should have argued to the district court that he satisfied the fourth requirement for the safety valve and that such argument would somehow have persuaded the judge to grant the reduction.

Petitioner points out, accurately, that the judge was sympathetic. Petitioner has not shown, either at sentencing or in these collateral proceedings, however, that he ever satisfied the fifth requirement. Argument on the fourth requirement could have made no material difference at sentencing.

Accordingly, the district court properly denied petitioner's motion.

AFFIRMED.